

What Companies and Higher Education Institutions Need to Know Regarding DOJ's New Memoranda to Enforce the Administration's Directive to "End Illegal DEI" Practices and for the "Total Elimination of Cartels and Transnational Criminal Organizations"

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On February 5, 2025, U.S. Attorney General Pam Bondi issued a series of fourteen policy memoranda directed to all employees of the U.S. Department of Justice ("DOJ"). Two are particularly likely to impact companies and higher education institutions: "Ending Illegal DEI and DEIA Discrimination and Preferences" and "Total Elimination of Cartels and Transnational Criminal Organizations." In this eUpdate, we summarize the key points of each and offer analysis and recommendations in light of the new directives.^[1]

1. "Ending Illegal DEI and DEIA Discrimination and Preferences"

Bondi issued a two-page memorandum directing DOJ's Civil Rights Division to "investigate, eliminate, and penalize" private companies and universities that have "illegal" diversity, equity, and inclusion programs.

Bondi's main authority for this directive: the recent United States Supreme Court case, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023), and President Trump's recently issued Executive Order ("EO") 14173. The memorandum cites the *Students for Fair Admission* decision as providing that "[e]ducational agencies, colleges, and universities that receive federal funds may not 'treat some students worse than others in part because of race.'" Further, it states that EO 14173 makes "clear that policies relating to 'diversity, equity, and inclusion' ("DEI") and 'diversity, equity, inclusion, and accessibility' ("DEIA") 'violate the text and spirit of our longstanding Federal civil-rights laws' and 'undermine our national unity.'"

Bondi's memorandum directs DOJ's Civil Rights Division and the Office of Legal Policy to meet a March 2025 deadline to submit to the Associate Attorney General a joint report with recommendations for "enforcing civil rights laws" and otherwise encouraging the private sector to end "illegal discrimination and preferences," including DEI policies.

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Among other things, the report should include proposals for “criminal” investigations and “up to nine potential civil compliance investigations of entities that meet the criteria outlined in” EO 14173. According to EO 14173, those entities include publicly traded corporations, large non-profit corporations or associations, foundations with assets of \$500 million or more, State and local bar and medical associations, and institutions of higher education with endowments over \$1 billion.[2] The joint report should also address what Bondi’s memorandum calls those that have engaged in “[t]he most egregious and discriminatory” DEI practices “in each sector of concern” within DOJ’s jurisdiction.

In a footnote, the memorandum contains a narrow carve-out, stating that while the memorandum is meant “to encompass programs, initiatives, or policies that discriminate, exclude, or divide individuals based on race or sex,” it “does not prohibit educational, cultural, or historical observances—such as Black History Month, International Holocaust Remembrance Day, or similar events—that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination.”

Closing with a brief paragraph under the header “Guidance to Institutions Receiving Federal Funds,” Bondi states that, consistent with EO 14173, DOJ “will work with the Department of Education to issue directions, and the Civil Rights Division will pursue actions, regarding the measures and practices required to comply with *Students for Fair Admissions*.”

Analysis and Recommendations

The DEI-focused memorandum raises several issues. First, DOJ is following in lockstep with the President’s Executive Orders, and this memorandum provides marching orders to DOJ attorneys to enforce the letter and perhaps spirit of the President’s Executive Orders.[3] Those orders are ambiguous in key areas and appear to rely on novel and broad interpretations of the law, and therefore DOJ’s roll-out of investigations and priorities may be uneven—even within DOJ and across the many local United States Attorney’s Offices. In particular, the directive about potential “criminal” investigations will create significant uncertainty—and risk—across various industry sectors and in higher education.

Second, the memorandum leaves unaddressed which existing criminal statutes would apply to DEI policies and practices by private actors that do not otherwise constitute illegal discrimination under existing law. Dorsey anticipates, however, that DOJ could rely on several federal statutes to investigate and prosecute fraud against the government, including 18 U.S.C. § 287 (false claims), 18 U.S.C. § 371 (conspiracy to defraud the government), 18 U.S.C. § 1001 (false statements made to the government), and Title 18 U.S.C. § 1031 (major fraud on government). Nonetheless, criminal investigations and prosecutions would constitute a major unprecedented shift for DOJ, as these criminal statutes have not been used much if at all to investigate and prosecute allegedly discriminatory behavior among private actors.[4]

For civil cases, however, DOJ has authority in Title VI of the Civil Rights Act which prohibits discrimination on the basis of race, color, and national origin in programs and

activities receiving federal funds. DOJ also has authority to bring cases under the False Claims Act against any government contractor or those who make claims to the government for a benefit or payment. Pursuant to Bondi's new memorandum, DOJ may pursue claims against those it may contend have submitted false certifications of compliance with the government's requirements as set forth in EO 14173.

Third, DOJ's emphasis on higher education institutions receiving federal funds indicates that these entities will be a heightened priority for this administration. We also anticipate potential increased whistleblower activity in these areas. Notably, however, the President's DEI-related executive orders are already undergoing challenges in the courts. Higher education groups, including college professors and university diversity officers, along with the City of Baltimore, filed suit in federal court in Maryland on Monday, February 3, 2025, seeking an order declaring EO 14173 and a related Executive Order, EO 14151, unlawful and unconstitutional and seeking to permanently enjoin their enforcement.^[5]

For these reasons, we recommend that companies and higher education institutions:

- Conduct an independent and comprehensive privileged internal DEI review to evaluate policies, practices, programs, initiatives, and communications and to assess reputational, business, and legal risk.
 - The focus of the review should involve assessing whether your organization may be acting contrary to Executive Orders, including EO 14173, as well as DOJ's directives. Pay particular attention to government contracts.
 - Because the Executive Orders and Bondi's memorandum do not change or replace existing anti-discrimination statutes, the review should assess whether and to the extent your organization may continue to engage in practices that are consistent with anti-discrimination and other laws that have long been on the books, despite the recent directives from the Trump administration.^[6]
 - The scope of the review should include external and internal communications as well as all training.
- Be prepared for the possibility of subpoenas, law enforcement involvement, or further scrutiny from agencies, including DOJ's Civil Rights Division and Civil Division - Fraud Section.
- Consider that what was formerly a garden-variety "discrimination" claim response playbook must evolve to address the changing landscape that now includes the possibility of False Claims Act liability and criminal enforcement. Consider additional training and adjusting mindsets to approach alleged discrimination consistent with administration directives when addressing DEI policies and practices and other certifications related to federal funding.

Dorsey continues to closely watch the progress of legal challenges to, as well as the development of DOJ efforts relying upon, EO 14173 and other Executives Orders.

Dorsey also continues to closely monitor the Trump Administration's position on DEI. We recommend companies and higher education institutions also watch the progress of the lawsuits challenging EO 14173 and the development of DOJ efforts relying upon it.^[7]

These legal challenges will impact the risks that DOJ will pursue investigations and enforcement actions against companies and higher education institutions for DEI-related

policies and practices.

2. “Total Elimination of Cartels and Transnational Criminal Organizations”

Also on February 5, Bondi issued a separate memorandum entitled “Total Elimination of Cartels and Transnational Criminal Organizations” that directs DOJ to marshal resources throughout the country toward the goal of eliminating cartels and transnational criminal organizations (“TCOs”). Importantly, the memorandum does not precisely define cartels or TCOs.^[8] But for cases involving what DOJ considers a cartel or TCO target, the memorandum establishes various factors for prosecutors to consider when making decisions regarding charging, arrests, and extraditions, to include whether the target is a manager or leader in the organization, whether the conduct resulted in the death or injury of a U.S. citizen, and whether the target engaged in international terrorism.

The memorandum provides that the Foreign Corrupt Practices Act (“FCPA”) Unit will prioritize cases such as bribery of foreign officials to facilitate human smuggling and the trafficking of narcotics and firearms and other cases involving cartels and TCOs and will “shift focus away” from other FCPA and fraud investigations. Importantly, this means that the FCPA Unit has been directed to focus away from the types of foreign corporate corruption cases it historically has brought, in the absence of a connection to cartels and TCOs. The potential implications of this policy for ongoing FCPA investigations remain unclear.

To emphasize DOJ’s new priorities, Bondi is removing what she calls “bureaucratic impediments to aggressive prosecution” of these cases. Namely, her memorandum suspends various authorization requirements that are ordinarily in place for the investigation and prosecution of FCPA and related cases that DOJ has long established and incorporated into its Justice Manual. In particular, for the newly- prioritized cartel and TCO-related cases, Bondi suspended a long-standing DOJ policy that required trial attorneys from the DOJ’s Fraud Section to handle FCPA and other corruption cases. From now on, “U.S. attorney’s offices shall provide the Foreign Corrupt Practices Act Unit with 24 hours’ advance notice of the intention to seek charges and make available to the unit upon request any existing memoranda relating to the contemplated charges.” Existing policies for handling classified information will remain in place.

The DOJ’s Money Laundering and Asset Recovery Section is directed to prioritize cases involving cartels and TCOs. DOJ is also disbanding its Kleptocracy Team and related Kleptocracy Asset Recovery Initiative and Task Force KleptoCapture and re-directing those efforts in investigation, prosecution, and asset forfeiture towards “the total elimination of Cartels and TCOs.” The Kleptocracy Asset Recovery Initiative had been aimed at obtaining the forfeiture of the proceeds of foreign official corruption and, where appropriate, using those recovered assets to benefit those harmed by acts of foreign corruption and abuse of office. Further, DOJ is elevating existing Joint Task Force initiatives against the MS-13 drug cartel and against human trafficking and focusing their resources on cartels and TCOs.^[9]

Bondi is also pursuing various legislative changes to target drugs manufactured and

distributed by cartels and TCOs, including permanently placing fentanyl-related substances on the Schedule I of the Controlled Substances Act and expanding federal law to cover devices and materials used to make counterfeit pills.

Analysis and Recommendations

Looking ahead, global companies and higher education institutions with international business or activities—and particularly those operating in industries, such as healthcare and financial services, and in regions, such as Latin America and China, that may be a focus of enforcement efforts by the Trump Administration—should take this opportunity to assess the effectiveness of their compliance programs in light of their risk profiles and changing enforcement priorities. This may include undertaking a risk assessment to understand the company's corruption and money laundering risk in regions that are at higher risk for enforcement under this new policy, including any potential risks relating to cartels and TCOs, among others; the risk profiles of any customers/merchants, agents, vendors, and other third parties acting on the company's behalf; and whether the existing compliance program is reasonably designed to detect and prevent misconduct in light of those risks.

Critically, however, the memorandum does not alter the bases for liability under the FCPA and anti-money laundering statutes or U.S. government's ability to enforce those statutes against U.S. and foreign companies. Moreover, as mentioned, the memorandum does not carefully define "cartels" and "TCOs." Companies and higher education institutions would be well-served to continue implementing appropriately resourced anti-corruption and anti-money laundering compliance programs tailored to their risks, bearing in mind several key considerations. First, U.S. authorities can—and have—initiated anti-corruption and anti-money laundering investigations years after the underlying conduct, considering applicable statutes of limitations. Companies and higher education institutions who may relax their anti-corruption and anti-money laundering compliance programs under this new policy may find themselves in the disadvantageous position of needing to quickly ramp up their compliance programs, with the potential for investigation of any anti-corruption or anti-money laundering misconduct that may have occurred in the interim, should any future administrations take a more aggressive approach to enforcement.

Second, the memorandum does not alter any enforcement policies of the U.S. Securities and Exchange Commission (SEC). U.S. and foreign companies that trade shares on U.S. exchanges remain subject to SEC jurisdiction, including with respect to the accounting provisions of the FCPA. Issuers must maintain accurate books and records and implement a system of internal controls sufficient to, among other things, provide reasonable assurances that transactions are executed, and assets are accessed and accounted for, in accordance with management's authorization.

Third, global companies and higher education institutions with international business or activities will remain subject to foreign anti-corruption and anti-money laundering regimes and the enforcement policies of foreign authorities. Many of these authorities, including

the French Parquet national financier and the U.K. Serious Fraud Office, have been increasingly active in recent years and may redouble their efforts in light of any perceived decrease in U.S. enforcement.

Finally, enforcement policies are subject to change. Companies and higher education institutions should design and implement compliance programs that are reasonably tailored to their risks, as determined by the FCPA and anti-money laundering statutes as well as current enforcement policy, in order to minimize internal disruption when faced with shifting enforcement policies going forward.

[1] On February 5, Bondi issued a number of additional memoranda, including one that orders DOJ attorneys to adhere to "zealous advocacy" of the Trump administration's policies and to avoid substituting their own personal political views or judgments. General Policy Regarding Zealous Advocacy on Behalf of the United States. Bondi also ordered DOJ to set up a task force to examine the "weaponization" of DOJ. Restoring the Integrity and Credibility of the Department of Justice.

[2] See Ending Illegal Discrimination And Restoring Merit-Based Opportunity – The White House. EO 14173, among other things, revoked a series of prior well-established executive orders, such as EO 11246, signed by President Lyndon B. Johnson in 1965, that prohibited employment discrimination by federal contractors and subcontractors and requiring them to take certain affirmative actions to prevent employment discrimination.

[3] A related Executive Order that DOJ likely will be enforcing in the private sector is EO 14168, "Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government" which directed federal agencies to enforce laws governing sex-based rights, protections, opportunities, and accommodations to protect men and women as biologically distinct sexes, and to remove all statements, policies, regulations, forms, communications, or other internal and external messages promoting gender ideology. See Defending Women From Gender Ideology Extremism And Restoring Biological Truth To The Federal Government – The White House.

[4] One legal scholar questioned whether Bondi's memorandum will lead to successful lawsuits because "[a]successful civil suit against a DEI program would have to prove that a company was making specific employment decisions on the basis of race or favoring employees in the workplace based on their race, sex, sexual orientation, transgender status, or other characteristics protected by Title VII. That would be a very difficult case to make in the real world." Noah Feldman, *Attorney General's DEI Memo Isn't What It Seems*, Bloomberg Law News (Feb. 2, 2025), Attorney General Pam Bondi's DEI Memo Isn't What is Seems - Bloomberg.

[5] For a copy of the complaint, see 2025.02.03 Anti-DEIA EOs Complaint PDF. For EO 14151, see: Federal Register :: Ending Radical and Wasteful Government DEI Programs and Preferencing.

[6] Examples of existing anti-discrimination statutes include Title VII of the Civil Rights Act of 1964 (prohibiting discrimination based on an individual's race, color, religion, sex, or national origin); Section 503 of the Rehabilitation Act of 1973 (preventing disability-based discrimination); and Vietnam Era Veterans' Readjustment Assistance Act (prohibiting military service-based discrimination).

[7] See Dorsey's recent eUpdates: [Goodbye Affirmative Action Plan? President Trump Revokes Long-Standing Federal Contractor and Grantee Practices and Targets Private Sector DEI Initiatives with New Enforcement Initiative | News & Resources | Dorsey and Federal Assistance in Jeopardy? What to Know about OMB Guidance About Hundreds of Billions in Federal Research and Loans to Research Institutions, Universities, and Private Organizations | News & Resources | Dorsey.](#)

[8] In a separate memorandum, Bondi states that "President Trump has tasked the Department of Justice with an ambitious and historic mission: total elimination of Tren de Aragua (TdA), La Mara Salvatrucha (MS-13), and international drug cartels from the United States." See [General Policy Regarding Charging, Plea Negotiations, and Sentencing.](#)

[9] In a separate memorandum, Bondi has limited the reach of criminal charges brought under the Foreign Agents Registration Act to focus on "more traditional espionage by foreign government actors." See [General Policy Regarding Charging, Plea Negotiations, and Sentencing.](#)